

APR 04 2007

FEDERAL ELECTION COMMISSION SECRETARIAT

**999 E Street, N.W.
Washington, DC 20463**

2007 APR -4 A 9:29

FIRST GENERAL COUNSEL'S REPORT

SENSITIVE

MUR: 5799

DATE COMPLAINT FILED: August 23, 2006

DATE OF NOTIFICATION: August 28, 2006

LAST RESPONSE RECEIVED: September 22, 2006

DATE ACTIVATED: March 12, 2007

EPS/TIER:

EXPIRATION OF S.O.L.: August 23, 2011

COMPLAINANT:

Christine Setzer

RESPONDENT:

Senator John McCain

RELEVANT STATUTES:

2 U.S.C. § 441i(e)(1)

11 C.F.R. § 300.62

INTERNAL REPORTS CHECKED:

Federal Disclosure Reports

FEDERAL AGENCIES CHECKED:

None

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I. BACKGROUND

This matter concerns a fundraising solicitation sent in connection with an event hosted by Spears for Adjutant General, South Carolina Adjutant General Stan Spears' re-election committee.¹ The face of the solicitation states "[y]ou are cordially invited to attend a private reception honoring Adjutant General Stan Spears with special guest United States Senator John McCain." The second page consists of reply cards that contain boxes for donors to check donation amounts ranging from \$100 to \$1,000, followed by a boxed labeled "Other." See Attachment 1. At the bottom of the reply card is a disclaimer stating:

Contributions to Spears for Adjutant General are not tax deductible for federal income tax purposes. The solicitation of funds is being made only by Spears for Adjutant General. We are honored to have Senator John McCain as our Special Guest for this event. In accordance with federal law, Senator McCain is not soliciting individual funds in excess of \$2,100 per person, nor is he soliciting corporate, labor union, or foreign national contributions. South Carolina state law allows campaign contributions of up to \$3,500 per election cycle. Registered lobbyists please disregard.

The complainant alleged that Senator McCain violated the "soft money" prohibitions enacted in the Bipartisan Campaign Reform Act ("BCRA"), specifically, 2 U.S.C. § 441i(e) and 11 C.F.R. § 300.62, which prohibit Federal candidates and officeholders from, among other things, soliciting funds in connection with any non-Federal election unless the funds are in amounts that do not exceed the Federal Election Campaign Act of 1971, as amended (the "Act's"), contribution limits and do not come from prohibited sources. In response to the

¹ The South Carolina Adjutant General is an elected official who oversees the South Carolina Army and Air National Guards.

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1 complaint, counsel for Senator McCain stated that a representative of Senator McCain reviewed
2 a draft of the invitation "to ensure that it included the disclaimers required by the FEC for
3 invitations to state candidate events mentioning federal officeholders." See McCain Response, at
4 1.

5 As explained below, we conclude that based on the statute and the Commission's
6 Advisory Opinions interpreting BCRA's soft money prohibitions, a Federal officeholder or
7 candidate may not consent to appear in a solicitation that is not expressly and entirely limited to
8 amounts and sources that comply with the Act's contribution limits and source prohibitions. We
9 therefore recommend the Commission find reason to believe that Senator McCain violated
10 2 U.S.C. § 441i(e) and 11 C.F.R. § 300.62,

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19 **II. DISCUSSION**

20 Under BCRA, Federal officeholders and candidates for Federal office may not solicit,
21 receive, direct, transfer or spend funds in connection with either Federal or non-Federal elections,
22 unless the funds comply with Federal contribution limits, source restrictions, and reporting

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1 requirements. 2 U.S.C. §§ 441i(e)(1)(A) and (B); 11 C.F.R. §§ 300.61 and 300.62. Specifically,
2 a Federal officeholder or candidate, whether in connection with a Federal or non-Federal
3 election, may not raise funds from individuals that exceed the current limit of \$2,300 per election
4 per candidate,² and may not raise funds from corporations or labor organizations.³ The
5 Commission defines the term "solicit" to mean "to ask, request, or recommend, explicitly or
6 implicitly, that another person make a contribution, donation, transfer of funds, or otherwise
7 provide anything of value." 11 C.F.R. § 300.2(m).⁴

8 The Commission has interpreted this prohibition in the context of particular facts
9 presented in several Advisory Opinions regarding Federal candidates' and officeholders'
10 participation in fundraising events where donations outside of Federal contribution limits and
11 source restrictions were sought. See AO 2003-03 (*Cantor*), AO 2003-36 (*Republican Governors*

² At the time of the alleged violation, the individual contribution limit was \$2,100.

³ A Federal officeholder or candidate for Federal office may, however, attend, speak, or be a featured guest at a fundraising event for a State, district, or local committee of a political party, without restriction or regulation. 2 U.S.C. § 441i(e)(3); 11 C.F.R. § 300.64. In the Explanation and Justification for 11 C.F.R. § 300.64, the Commission noted that the rule "is carefully circumscribed and only extends to what Federal candidates and officeholders say at the State party fundraising events themselves ... the regulation does not affect the prohibition on Federal candidates and officeholders from soliciting non-Federal funds for State parties in fundraising letters, telephone calls, or any other fundraising appeal made before or after the fundraising event. Unlike oral remarks that a Federal candidate or officeholder may deliver at a State party fundraising event, when a Federal candidate or officeholder signs a fundraising letter or makes any other written appeal for non-Federal funds, there is no question that a solicitation has taken place that is restricted by 2 U.S.C. § 441i(e)(1)." 70 Fed. Reg. 37,649, 37,653 (June 30, 2005).

⁴ The Commission adopted this definition of "solicit" as of April 19, 2006, in response to the decision of the United States Court of Appeals for the District of Columbia Circuit in *Shays v. FEC*, 414 F.3d 76 (D.C. Cir. 2005), *reh'g en banc denied* (Oct. 21, 2005). The Commission specifically declined to make changes to the principles set forth in the Advisory Opinions that are applicable here or to initiate a rulemaking to address the issues based on testimony that the principles articulated in these Advisory Opinions are well-understood and that "the community is complying with them." See 71 Fed. Reg. 13,926, at 13,930-31 (Mar. 20, 2006).

1 *Association ("RGA")); see also AO 2003-37 (Americans for a Better Country ("ABC"))*
2 *(superseded by 11 C.F.R. § 106.6 on Nov. 23, 2004).⁵*

3 The facts addressed in the *Cantor* Opinion relate to the appearance of Federal candidates
4 and officeholders in publicity preceding an event at which funds would be raised for state
5 candidates. Specifically, the requestors noted that

6 [T]hey would like Representative Cantor to: (1) attend campaign events, including
7 fundraisers, (2) solicit financial support, and (3) do so orally or in writing.
8 Congressman Cantor would like to participate in their campaigns in this manner.
9 Requestors ask for guidance from the Commission about the degree to which
10 Representative Cantor, as a Federal officeholder and candidate, may engage in
11 State and local election activities.
12

13 In response to the specific question asking whether the Congressman's attendance at the event
14 may be publicized and whether he may participate in the event as a featured guest, the
15 Commission responded:

16 Section 441i(e)(1) and section 300.62 do not apply to publicity for an
17 event where that publicity does not constitute a solicitation or direction of non-
18 Federal funds by a covered person, nor to a Federal candidate or officeholder
19 merely because he or she is a featured guest at a non-Federal fundraiser.

20 In the case of publicity, the analysis is two-fold: First, whether the
21 publicity for the event constitutes a solicitation for donations in amounts
22 exceeding the Act's limitations or from sources prohibited from contributing
23 under the Act; and second, whether the covered person approved, authorized, or
24 agreed or consented to be featured or named in, the publicity. If the covered
25 person has approved, authorized, or agreed or consented to the use of his or her
26 name or likeness in publicity, and that publicity contains a solicitation for
27 donations, there must be an express statement in that publicity to limit the
28 solicitation to funds that comply with the amount limitations and source
29 prohibitions of the Act.

30 AO 2003-03 (Response to Question 3.c) (citations omitted).

⁵ Counsel for Senator McCain properly notes, in response to the complaint in this matter, that Senator McCain is "in the same position as the requestors" in *Cantor* and *RGA* and therefore may rely on the Advisory Opinions without being subject to sanction. See 2 U.S.C. § 437f (c).

1 The Commission revisited the issue of covered persons' participation as featured guests
2 in RGA. The specific question there was:

3 1.b. May a covered individual participate [as a featured guest at an RGA
4 fundraising event] by having his name appear on written solicitations for an RGA
5 fundraising event as the featured guest or speaker?
6

7 After restating the two-step analysis from the *Cantor* Advisory Opinion, the Commission
8 answered:

9 A Federal candidate may not solicit funds in excess of the amount limitation or in
10 violation of the source prohibitions of the Act. If the covered individual approves,
11 authorizes, or agrees or consents to be named or featured in a solicitation, the
12 solicitation must contain a clear and conspicuous express statement that it is
13 limited to funds that comply with the amount limits and source prohibitions of the
14 Act.

15 AO 2003-36 (Response to Question 1.b).

16 Thus, if a Federal officeholder or candidate approves, authorizes, or agrees or consents to
17 be named or featured in a solicitation, then the entire solicitation must be limited to Federally
18 permissible funds. The Commission further explained this restriction in RGA, stating that a
19 disclaimer will not inoculate a covered person who approves his or her appearance in a
20 solicitation that explicitly seeks funds beyond the limits and prohibitions of the Act.
21 Specifically, the Commission explained that a disclaimer is inadequate where, as here, the
22 publicity or other written solicitation asks for funds in excess of the Act's contribution limits or
23 from prohibited sources:

24 Although Advisory Opinion 2003-03 [*Cantor*] might be read to mean that a
25 disclaimer is required in publicity or other written solicitations that explicitly ask
26 for donations 'in amounts exceeding the Act's limitations and from sources
27 prohibited from contributing under the Act,' that was not the Commission's
28 meaning. The Commission wishes to make clear that the covered individual may
29 not approve, authorize, agree, or consent to appear in publicity that would
30 constitute a solicitation by the covered person of funds that are in excess of the

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limits or prohibitions of the Act, regardless of the appearance of such a disclaimer.

AO 2003-36, at n.9.

Subsequently, the Commission again considered the involvement of Federal officeholders or candidates in fundraising for non-Federal elections in the *ABC* Advisory Opinion. In *ABC*, which primarily addressed the allocation of expenses by nonconnected committees and was superseded when the Commission enacted new regulations regarding the allocation of certain expenses (*see* 69 Fed. Reg. 68,056, 68,063 (Nov. 23, 2004)), the requestor asked if Federal officeholders or candidates could be named as "honored guests" or "featured speakers" at fundraising events for ABC's non-Federal account. The Commission, citing to both the *Cantor* and *RGA* Advisory Opinions, stated:

[A] candidate's consent or agreement to be mentioned in an invitation as an honored guest, featured speaker or host, where that invitation is a solicitation, constitutes a solicitation by the candidate. Thus, if a candidate agrees or consents to be named in a fundraising solicitation as an honored guest, featured speaker or host, or if the invitation constitutes a solicitation for any other reason, then the solicitation must contain a clear and conspicuous statement that the *entire solicitation* is limited to funds that comply with the amount limits and source prohibitions of the Act.

AO 2003-37, at 18 (emphasis added).⁶

In sum, to comply with the soft money prohibitions of BCRA, Federal officeholders and candidates must adhere to the following requirements if and when they approve, authorize, agree or consent to appear in a written solicitation in connection with the election of state candidates:

⁶ Although AO 2003-37 (*ABC*) was superseded by new regulations addressing certain allocation rules, we believe the analysis as it pertained to Federal officeholder or candidate involvement in fundraising for non-Federal elections is sound.

- 1 1. A Federal officeholder or candidate may appear in written solicitations in
2 connection with the election of state candidates, so long as the solicitation is
3 expressly and entirely limited to amounts and from sources that comply with
4 the Act's contribution limits and source prohibitions.
- 5 2. If a written solicitation in connection with the election of state candidates asks
6 for donations, but does not specify an amount, a Federal officeholder or
7 candidate may appear in the written solicitation provided it contains express
8 language stating that the Federal officeholder or candidate is only soliciting
9 amounts that comply with the Act's contribution limits and source
10 prohibitions.
- 11 3. However, if a written solicitation in connection with the election of state
12 candidates explicitly asks for donations of funds in amounts exceeding the
13 Act's contribution limits or from prohibited sources, then a Federal
14 officeholder or candidate may not appear in the solicitation regardless of
15 whether there is an express statement limiting the Federal officeholder or
16 candidate's solicitation to funds that comply with the amount limits and
17 source prohibitions of the Act.⁷

⁷ An exception to this bar exists for situations where a Federal officeholder or candidate is "merely mentioned" in the text of a solicitation. Such "mere mention" would not, in and of itself, constitute a solicitation of non-Federal funds by the Federal officeholder or candidate. See AO 2003-36, at 6. At the open meeting at which the Commission discussed RGA, Commissioners stressed that this was a narrow exception that would cover, for example, instances where a state candidate sought and received permission from a U.S. Senator to refer in a solicitation to the fact that he or she worked as a staff member to the Senator. See Audio Tape Discussion of AO 2003-36 (Jan. 7, 2004). In any event, the prominent references to Senator McCain as "Special Guest" and "Speaker" for this event go well beyond "mere mention," and an officeholder's appearance in such capacities is specifically addressed in AO 2003-36.

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1 The only limitation placed on the solicitation at issue in this matter was that it was not
2 seeking contributions from "Guard members or registered lobbyists." See Attachment 1. The
3 solicitation did not contain any language stating that the entire solicitation was limited to
4 Federally permissible sources. See *id.* In addition, the solicitation was not expressly limited to
5 \$2,100, and although it sought specific amounts only up to \$1,000, the inclusion of the "Other"
6 box along with the disclaimer that "South Carolina state law allows campaign contributions of up
7 to \$3,500 per election cycle" implied that individual contributors may exceed the Federal
8 contribution limits. See 2 U.S.C. § 441a.

9 Pursuant to our reading of the statute and applicable Advisory Opinions,⁸ it therefore
10 would run afoul of BCRA's prohibitions on soliciting non-Federal funds for Senator McCain's
11 name or likeness to appear in this invitation as a featured guest or speaker since he approved,

⁸ Our analysis may reflect the regulated community's understanding as well. In the Commission's rulemaking on the definitions of "solicit" and "direct," and in its earlier rulemaking on candidate solicitations at state, district, and local party fundraising events, commenters claimed that they understood the guidance in *Cantor* and *RGA*. See Definitions of "Solicit" and "Direct," 71 Fed. Reg. 13,931. The Campaign Legal Center, whose President and General Counsel represents Senator McCain in this matter, correctly summarized the relevant portions of *RGA* through an example apparently like the solicitation in this matter, and concluded that such a solicitation would violate BCRA. The Campaign Legal Center's website explains:

The Advisory Opinion also sets forth rules for *RGA* written solicitations of funds featuring Federal candidates and officeholders, among other things clarifying that *RGA* solicitation materials in which a Federal officeholder or candidate has authorized his or her appearance may not ask for donations from Federally impermissible sources or exceeding Federal amount limitations (e.g., the solicitation cannot ask for a \$50,000 contribution from individuals but then indicate that the Federal officeholder is only asking for \$5,000 donations from individuals).

FBC Issues Advisory Opinion 2003-36 on Fundraising for *RGA* (available at <http://www.campaignlegalcenter.org/FBC-129.html> (Jan. 12, 2004)) (Attachment 2). See also The Republican Governors' Opinion: More on What Candidates Can, or Cannot, Do with "527s" (available at <http://www.moresoftmoneyhardlaw.com/moresoftmoneyhardlaw/updates> (Jan. 13, 2004)) (Attachment 3). Unlike the invitation in this MUR, however, the Campaign Legal Center's illustration apparently does not contain a disclaimer as none is mentioned.

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1 authorized, agreed, or consented to be featured, or named in, the invitation.⁹ *See supra*, pp. 2-3.
2 Moreover, the disclaimer in the solicitation, noting that "[t]he solicitation for funds is being
3 made only by Spears for Adjutant General" and that "[i]n accordance with Federal law, Senator
4 McCain is not soliciting individual contributions in excess of \$2,100 per person, nor is he
5 soliciting corporate, labor union, or foreign national contributions" does not suffice to divorce
6 the Senator from the fact that the entire solicitation is not expressly and entirely limited to
7 Federally permissible funds. *See supra*, pp. 4-8. We therefore recommend that the Commission
8 find reason to believe that Senator John McCain violated 2 U.S.C. § 441i(e) and 11 C.F.R.
9 § 300.62.

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⁹ The Executive Director of Senator McCain's leadership PAC reviewed and, after conferring with legal counsel, approved the invitation, including the disclaimer. *See* Affidavit of Craig Goldman (attachment to McCain Response), at 1-2.

IV. RECOMMENDATIONS

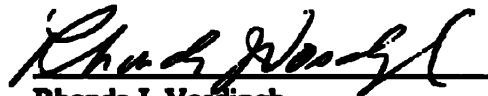
1. Find reason to believe that Senator John McCain violated 2 U.S.C. § 441i(e) and 11 C.F.R. § 300.62;
2. _____
3. Approve the attached Factual and Legal Analysis; and
4. Approve the appropriate letter.

April 3, 2007

Date



Thomasenia P. Duncan
Acting General Counsel



Rhonda J. Vording
Associate General Counsel for Enforcement



Ann Marie Terzaken
Assistant General Counsel



Adam Schwartz
Attorney

Attachments

1. Invitation to August 17, 2006 campaign fundraising event
2. FEC Issues Advisory Opinion 2003-36 on Fundraising for RGA
3. The Republican Governors' Opinion: More on What Candidates Can, or Cannot, Do with "527s"

You are cordially invited
to attend a private reception
honoring
Adjutant General Stan Spears
with special guest
United States Senator John McCain
and
South Carolina Attorney General Henry McMaster
House Judiciary Committee Chairman Jim Harrison

Thursday, August 17, 2006
6:30 p.m.

Columbia Chamber of Commerce Building
930 Richland Street
Columbia, South Carolina

*This invitation was not intended for National Guard members or registered lobbyists. Accordingly, if you are a Guard member or lobbyist, please disregard this invitation. A candidate for Adjutant General may not solicit contributions from Guard members or registered lobbyists. However, Guard members may voluntarily contribute to an Adjutant General candidate. This invitation was not mailed or distributed at government expense. Paid for by Stan Spears for Adjutant General.

Business card **Minimum donation requested \$100**
For more information, call Cadey Caldwell (803) 252-3300
Authorized and paid for by Spears for Adjutant General

Adjutant General Stan Spears Reception

☐ Yes, I will attend the reception in honor of Adjutant General Stan Spears on August 17. My contribution, payable to Spears for Adjutant General, in the amount of \$_____ is enclosed. (\$100 minimum per couple)

☐ I will be unable to attend the event. However, I would like to participate and my contribution, payable to Spears for Adjutant General, is enclosed in the following amount:

☐ \$1,000 ☐ \$500 ☐ \$250 ☐ \$100 ☐ Other \$_____

CONTRIBUTION OPTIONS: ☐ Check Enclosed ☐ Credit Card Information Below

Name: _____ Telephone: _____

Address: _____

City, State, Zip: _____

Occupation: _____ Rank: _____

Name on Card: _____ Card Type: _____

Card #: _____ Exp. Date: _____

Contributions to Spears for Adjutant General are not tax deductible for federal income tax purposes. The collection of funds is being made only by Spears for Adjutant General. We are honored to have Senator McCain as our Special Guest for this event. In accordance with federal law, Senator McCain is not soliciting individual contributions in excess of \$2,100 per person, nor is he soliciting corporate, labor union, or foreign national contributions. Such Contributions may law allow complete contributions of up to \$2,500 per election cycle. Registered lobbyists please desist.

NO FEE FOR RETURN POSTAGE/POSTAGE GUARANTEED. PLEASE RETURN TO ENCLOSED ENVELOPE.

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Name: _____ Telephone: _____

Address: _____

City, State, Zip: _____

Occupation: _____ Rank: _____

Name on Card: _____ Card Type: _____

Card #: _____ Exp. Date: _____

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Occupation: _____ Rank: _____

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Card #: _____ Exp. Date: _____

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CONTRIBUTION OPTIONS: ☐ Check Enclosed ☐ Credit Card Information Below

Name: _____ Telephone: _____

Address: _____

City, State, Zip: _____

Occupation: _____ Rank: _____

Name on Card: _____ Card Type: _____

Card #: _____ Exp. Date: _____

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NO FEE FOR RETURN POSTAGE/POSTAGE GUARANTEED. PLEASE RETURN TO ENCLOSED ENVELOPE.



CLC Blog

SCRA/McCain-Feingold

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FEC PROCEEDINGS

FEC: FEC Proceedings and Legal Center Comments by Topic: 527 Organizations and "Political Committee" Status

Legal Center Files FEC Comments on Unity 08 AOR

The Legal Center and Democracy 21 filed comments with the FEC on Monday regarding an advisory opinion request from Unity 08 (AOR 2008-20). The filing urges the Commission to advise Unity 08 that it is a "political committee" under federal law, and as such subject to all contribution limits and reporting requirements.

Unity 08, however, asks the Commission to declare that the organization is not a "political committee," and that it won't become one until the summer of 2008 when it formally endorses a presidential ticket. Prior to that time, Unity 08 wishes to raise and spend funds to influence the 2008 presidential election without complying with federal campaign finance restrictions. The Legal Center's comments explain in detail why Unity 08's request to operate outside the campaign finance laws should be denied.

[Click here to view the Legal Center's comments on AOR 2008-20.](#)

Shays, Meehan File Suit That Seeks To Force The FEC To Promulgate Rules For 527 Groups

On September 14, 2004, Representatives Marty Meehan (D-MA) and Christopher Shays (R-CT), two of the principal sponsors of the Bipartisan Campaign Reform Act, filed suit in the U.S. District Court for the District of Columbia to have the FEC "promulgate legally sufficient regulations to define the term 'political committee.'" Senators John McCain (R-AZ) and Russ Feingold (D-WI) will seek to participate in a lawsuit. The Campaign Legal Center supports the suit and will serve as counsel to the Senators McCain and Feingold in the case.

[Click here to view the full press release.](#)

[Click here to view the Shays, Meehan complaint.](#)

Reform Groups Urge FEC to Act on Complaints Against 527s

August 31, 2004 -- Three campaign finance reform groups - the Campaign Legal Center, Democracy 21 and the Center for Responsive Politics -

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ATTACHMENT 2

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urged the Federal Election Commission to act on their months-old complaints against several 527 groups, despite the agency's refusal to issue new rules for 527s in this election cycle.

The complaints - against The Media Fund, the Leadership Forum, the Progress for American Voter Fund and Swift Boat Veterans for Truth - allege that these groups are violating longstanding federal law by failing to register with the FEC as political committees. Under the Federal Election Campaign Act of 1974, any group that has a "major purpose" of influencing a federal election, and raises or spends more than \$1,000 doing so, must register with the FEC and adhere to the rules for such committees. Under those rules, these groups must adhere to "hard money" contribution limits and source prohibitions and must disclose their activities to the FEC.

These 527s are now raising and spending tens of millions of dollars in soft money, with the obvious purpose of influencing the outcome of the coming election.

[Click here to view the letter filed with the FEC.](#)

[Click here to view the press release.](#)

Campaign Finance Groups File FEC Complaint Charging "Swift Boat Veterans for Truth" is Violating Federal Campaign Finance Laws

On August 10, 2004, Democracy 21, the Campaign Legal Center and the Center for Responsive Politics today filed a complaint with the Federal Election Commission (FEC) charging that the pro-Republican 527 group, Swift Boat Veterans for Truth (SBVT), is illegally raising and spending soft money on ads to influence the 2004 presidential elections.

[Click here to see the remainder of the press release.](#)

[Click here to read the complaint.](#)

Disqualification of FEC Chairman

On September 27, 2004 campaign finance groups filed a motion calling on the FEC to disqualify the agency's chairman, Bradley Smith, from "any participation" in the FEC's adjudication of a complaint filed on August 10, 2004 by the reform groups against Swift Boat Veterans for Truth (SBVT). The motion cites comments made by Chairman Smith about SBVT in recent public appearances, which "compel his disqualification from all Commission proceedings" in the case.

[Click here to view a copy of the motion.](#)

[Click here to view exhibits A through E.](#)

[Click here to view the press release.](#)

ATTACHMENT 2
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Senate Governmental Oversight Committee Hearings on the FEC

Senator Trent Lott (R-MI), chair of the Senate Rules Committee, held the first FEC oversight hearing in more than six years on Wednesday, July 14, 2004.

Prior to and during the hearing, Chairman Lott expressed concern with the Commission's failure to act on important policy matters, including during the agency's recent consideration of so-called "527 groups" that are raising and spending millions of dollars in soft money to influence the coming election.

At the hearing's conclusion, Senator Lott expressed interest in pursuing legislation to reform the FEC in the next session of Congress.

[Click here to read the Legal Center's press release.](#)

[Click here to read Trevor Potter's testimony in its entirety.](#)

[Click here to view Senator John McCain's testimony.](#)

[Click here to view Senator Russ Feingold testimony.](#)

[Click here to view Bradley Smith's testimony.](#)

[Click here to view Ellen Weintraub's testimony.](#)

[Click here to view Trevor Potter's testimony.](#)

[Click here to view Benjamin Ginsberg testimony.](#)

[Click here to view Robert Bauer's testimony.](#)

[Click here to view charts on FEC deadlocked votes.](#)

Campaign Finance Groups File FEC Complaint Charging Progress for America Voter Fund is in Violation of Federal Campaign Finance Laws

On June 22, 2004, Democracy 21, the Campaign Legal Center, and the Center for Responsive Politics filed a complaint with the Federal Election Commission (FEC) charging that the pro-Republican 527 group, Progress for America Voter Fund (PFA-VF), is illegally raising and spending soft money to influence the 2004 presidential elections.

Earlier this year, the three campaign finance groups filed a similar complaint with the FEC against the pro-Democratic 527 groups, America Coming Together (ACT) and The Media Fund, and the pro-Republican group, the Leadership Forum. On June 22, 2004, the three groups filed a second complaint against ACT charging it was engaging in "knowing and willful violations" of the law. The FEC has not acted on these complaints.

[Click here to view the complaint filed against Progress for America Voter Fund.](#)

[Click here for more in-depth coverage on this case by Democracy 21.](#)

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Legal Center Files Complaint against Democratic 527 for knowing and willful violation of Federal law

Pro-Democratic group America Come Together (ACT) knowingly and willfully violated campaign finance laws, according to an FEC complaint filed on June 22, 2004, by Democracy 21, the Campaign Legal Center and the Center for Responsive Politics.

The complaint charges that in its effort to secure President Bush in the November election, the 527 group violated the Federal Election Campaign

Act (FECA) by illegally soliciting funds, spending more money on voter mobilization activities than allowed by law and using soft—rather than hard—money to finance direct mailings. This complaint follows separate allegations filed in January against ACT and other 527s group by the trio.

[Click here to read the complaint.](#)

[Click here to read the press release.](#)

Campaign Legal Center Joins Lawsuit Seeking to Require a 527 to Register as a Federal Political Committee

On May 24, 2004, the Campaign Legal Center joined a lawsuit seeking to overturn the FEC's inaction in a complaint filed in 2000 by the Kean for Congress Committee against a "stealth PAC" 527 organization known as the "Council for Responsible Government" or "CRG." The FEC's General Counsel concluded that the 527 group should have registered and reported as a federal political committee because its "major purpose" was to support and oppose federal candidates. Indeed, it stated that "there is no indication that [CRG] had engaged in any other type of activity." The FEC deadlocked 3-3 on the Counsel's recommendation so it took no action against the group. The lawsuit, in Federal District Court, seeks judicial review of the FEC's failure to act, a finding by the Court that the refusal to proceed by three FEC commissioners was "arbitrary and capricious," and a reversal of the FEC's action by the Court. The case is particularly significant in light of the Commission's recent decision to delay consideration of the draft regulations on 527 organizations because this case seeks enforcement of already existing law and FEC regulations. The spending by the stealth 527 occurred in 2000, prior to this year's onslaught of 527 groups seeking to influence federal elections with their ads, but similarly claiming they are not subject to the federal election laws.

[Click here to read the related press release with links to the complaint and exhibits.](#)

FEC to Delay 527 Rulemaking

On May 19, 2004, the Federal Election Commission yesterday approved the agency general counsel's recommendation to delay consideration of the draft regulations on section 527 organizations for 90 days. This vote followed the 4-2 defeat of the proposed rules drafted by Commissioners Michael Toner (R) and Scott Thomas (D) and almost certainly means any new regulations will not affect 527 activities in the current election cycle.

The proposal would have required Section 527 groups (except for those exclusively focused on state elections, state ballot measure campaigns, or nominations to non-elective offices) to register with the FEC as federal political committees if they spend more than \$1,000 on "expenditures" for the purpose of influencing federal elections. For these 527s, such activities would include public communications promoting or attacking federal candidates or political parties, and partisan get-out-the-vote drives in federal election years.

In turn, as political committees registered with the FEC, these Section 527 groups would have to use exclusively "hard money" to finance public communications which promote, support, attack or oppose only clearly identified federal candidates. Moreover, they would have to spend a minimum of 50 percent "hard money" on their partisan voter drive activities that urge the public to register, vote or support candidates of a particular

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party or associated with a particular issue but do not mention federal candidates.

[To view the Toner/Thomas draft rules, please click here.](#)

[To view the statement by Trevor Potter on the FEC's decision to delay, please click here.](#)

[To view Senators McCain and Feingold's statement on the FEC's delay, please click here.](#)

[To view the joint statement by Bush-Cheney Campaign Chairman Mark Raskot and RNC Chairman Ed Gillespie on the FEC Ruling, please click here.](#)

[To view Fred Wertheimer's statement on the FEC decision, please click here.](#)

Apr 28, 2004 - McCain Senate Floor Statement on the FEC and 527 Groups

Congressional Record:

Mr. McCain : Mr. President, I was in Arizona recently, and by chance I watched C-SPAN airing the Federal Election Commission hearing on the issue of 527s. Let me assure my colleagues, it was both eye opening and appalling.

[Click here to read Senator McCain's statement in its entirety.](#)

Reformers File Comments on FEC Political Committee Rulemaking

On April 6, 2004 the Campaign Legal Center, Democracy 21, and the Center for Responsive Politics filed comments with the FEC in response to its Notice of Proposed Rulemaking on political committee status.

The comments criticized the "overbroad approach" of the Notice of Proposed Rulemaking -- particularly its incorrect suggestion that the FEC could subject all section 501(c) organizations to a "promote, support, attack or oppose" standard for whether their public communications constitute "expenditures." They urged the FEC instead to focus its ongoing rulemaking on remedying the flawed "allocation" regulations for non-connected political committees and clarifying the rules under which section 527 political organizations must register as political committees with the Commission.

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[Click here to view the comments filed with the FEC by the Campaign Legal Center, Democracy 21 and the Center for Responsive Politics.](#)

Other Comments:

[Click here to view the comments filed by Senators John McCain and Russ Feingold and Representatives Christopher Shays and Marjorie Mathers.](#)

[Click here to view the comments filed by Professor Dan Ortiz, University of Virginia.](#)

[Click here to view the comments filed by Professor Fran Hill, University of Miami.](#)

RNC and Bush-Cheney Campaign File FEC Complaint Against Kerry Campaign and 527 Groups

On May 31, 2004 the Republican National Committee (RNC) and the Bush-Cheney campaign filed a complaint with the FEC against John Kerry's presidential campaign and a number of Democratic-leaning 527 organizations, activists and donors.

The complaint alleges that the 527 groups are illegally using soft money to promote Senator Kerry's candidacy for the presidency and seek the defeat of President Bush. Among other things, it argues that the groups have violated federal campaign finance law by failing to register as political committees with the FEC. It also charges that the Kerry campaign and the 527 groups supporting his candidacy have engaged in illegal coordination, citing recent media buys and "the overlap in personnel between the web of Democrat soft money organizations with the John Kerry for President campaign."

Concerned that FEC enforcement action would not occur before the conclusion of this election cycle due to the nature of the agency's administrative procedures, the RNC and the Bush-Cheney campaign have asked the Commission to dismiss this complaint at its next public meeting - so that it could immediately seek relief in federal district court.

[Click here to view the complaint filed by the RNC and the Bush-Cheney campaign with the FEC.](#)

Reform Supporters Urge FEC to Narrow Its Rulemaking to Critical "527 Group" Issues to Avoid Agency "Gridlock" and "Inaction"

In a letter submitted to the FEC on March 16, 2004, the Campaign Legal Center, Democracy 21 and the Center for Responsive Politics expressed serious concern that the Commission is attempting to resolve far too many issues in its expedited rulemaking concerning 527 groups -- and is thus risking gridlock and inaction. To ensure that the rulemaking succeeds and prevents the most serious and prevalent federal campaign finance law circumvention schemes, the reform groups urged the FEC to narrow the focus of the rulemaking to address allocation rules for 527 groups and when such groups should have to register as federal political committees and use hard money for advertising. By contrast, the reformers argued that issues "relating to section 501(c) groups raise a number of questions that do not need to be addressed at this stage and, in fact, need to be resolved by Congress."

[Click here to view a copy of the letter submitted to the FEC.](#)

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FEC Draft Notice of Proposed Rulemaking on Political Committee Status

On Thursday, March 4th, 2004, the FEC adopted a Notice of Proposed Rulemaking (NPRM) on Political Committee Status by a vote of five to one. Comments on the NPRM are due on April 5th (for those who wish to testify at public hearings on April 14th and 15th) or April 9th (for those who do not

wish to testify).

[Click here to view the Political Committee Status NPRM in its entirety.](#)

FEC Adopts ABC Advisory Opinion

On Wednesday, February 18, 2004, the FEC adopted an Advisory Opinion in response to the request from the 527 organization known as "Americans for a Better Country" (ABC). The Advisory Opinion marks the beginning of the FEC's efforts this year to resolve questions about the legality of plans by some 527 organizations to participate in federal election campaigns using extensive amounts of soft money. The Commission will comprehensively address these questions in a coming rulemaking.

The Advisory Opinion adopted by the FEC addressed only 527 political organizations that have registered a federal account with the FEC. In key part, it indicated that these organizations:

- * must use exclusively hard money to finance public communications which promote, support, attack or oppose only clearly identified federal candidates;
- * may spend a mixture of hard and soft money to finance public communications which promote, support, attack or oppose both clearly identified federal and non-federal candidates; and
- * may finance generic voter drives (i.e., voter drives that mention political parties or issues but not candidates) according to the "allocation" formula for such activity appearing in the FEC's regulations.

The Advisory Opinion, however, did not address a number of other important questions which have emerged concerning 527 political organizations with clear plans to raise and spend soft money to influence federal elections. For example, it did not address whether 527 political organizations which have not registered a federal account with the FEC may spend soft money on public communications promoting or attacking federal candidates - or, more broadly, the circumstances under which 527 organizations must register as federal political committees with the FEC.

The Advisory Opinion also did not address the adequacy of the FEC's existing allocation regulations for "generic voter drive" activity - which can readily be gamed to permit 527 political organizations to use an "allocation" ratio that is extraordinarily tilted towards soft money. Indeed, Americans Coming Together (ACT) - a 527 political organization which registered a federal account with the FEC and will focus its efforts on "generic voter drives" - claimed an allocation ratio for such activity of 98 percent soft money and but 2 percent hard money in its year-end filings with the FEC.

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The FEC has indicated that it will commence a rulemaking to comprehensively address issues relating to the involvement of 527 political organizations in federal elections. The questions left unresolved by the ABC Advisory Opinion, and potentially even the decisions actually made by the Opinion, will be evaluated in that rulemaking. In January, the FEC's Commissioners (by a four-to-two vote) adopted a plan calling for the completion of this rulemaking by May.

The FEC adopted the ABC Advisory Opinion by a vote of four-to-two - with Vice-Chair Ellen Weintraub and Commissioners Danny McDonald, Scott Thomas and Michael Toner voting in favor, and Chair Bradley Smith and Commissioner David Mason in opposition. The final Advisory Opinion

adopted by the FEC was based on a draft prepared by Vice-Chair Weintraub, which was itself based on a prior draft prepared by the FEC's Office of General Counsel (with some modifications).

In employing the "promote, support, attack or oppose" standard for spending on public communications by a federal political committee, the final Advisory Opinion rejects the notion that the statutory definition of "expenditure" in federal campaign finance law is limited to "express advocacy" in all contexts. Campaign Legal Center President and General Counsel Trevor Potter applauded this aspect of the Advisory Opinion - while also cautioning that the Opinion "was only the first step in the FEC's review of activity to influence federal elections by 527 political organizations" and urging the Commission to use the upcoming rulemaking "to ensure that the door to unlimited use of soft money for federal elections by partisan 527's is firmly closed."

[To view the ABC Advisory Opinion, please click here.](#)

[To view the various draft opinions and amendments submitted by the FEC's Commissioners and Office of General Counsel, please click here.](#)

[To view the reaction of Campaign Legal Center President and General Counsel Trevor Potter to the ABC Advisory Opinion, please click here.](#)

[To view a transcript of the FEC's Open Meeting on February 18th on the ABC Advisory Opinion, please click here.](#)

527's and the 2004 Federal Elections

On January 15, 2004, the Campaign Legal Center joined Democracy 21 and the Center for Responsive Politics in filing a complaint with the FEC alleging that certain newly formed "527 organizations" created to spend soft money on the upcoming federal elections have violated campaign finance law.

According to media reports, these groups -- Americans Coming Together (ACT), The Media Fund and The Leadership Forum -- have been created expressly to spend large sums on partisan voter mobilization drives or "issue advocacy" designed to influence the coming federal elections, and have a major purpose of influencing federal candidate elections. Federal election law requires organizations with such a major purpose, and that spend more than \$1,000 to influence federal elections, to register as political committees with the FEC. Federal political committees may only accept "hard money" -- limited contributions from individuals and other federal political committees.

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In particular, these groups have set up purportedly "non-federal" accounts which will accept corporate and labor funds and large contributions from individuals -- soft money -- and use them to finance partisan voter drives or "issue advocacy" aimed at the coming federal elections. The complaint alleges that these accounts are, in fact, clearly federal political committees that must be registered with the FEC, and must operate within the normal "hard money" source and amount restrictions. More broadly, it notes that "[i]n pursuing these schemes, these section 527 groups are attempting to replace the political parties as new conduits for injecting soft money into federal campaigns."

[Click here to view the FEC complaint.](#)

[Click here to view Exhibits A-J.](#)

[Click here to view Exhibits K-T.](#)

[Click here to view Exhibits U-EE.](#)

The issue of permissible activities for "527 organizations" was also placed before the FEC through the filing of an Advisory Opinion request by ACT on January 13, 2004. The ACT Advisory Opinion request, which has not yet been deemed complete by the Commission, inquires about (and argues for the legality of) ACT's voter mobilization plans. It also suggests that a prior Advisory Opinion request filed by a Republican organization known as Americans for a Better Country (ABC) – a request inquiring about activities similar to those which press accounts have indicated ACT will undertake – "does not generally present questions pertinent to ACT's activities."

The ACT request also takes issue with comments filed by the Campaign Legal Center and Democracy 21 in response to the prior Advisory Opinion request from ABC. These comments argue that corporate and labor treasury funds cannot be "indirectly" expended through 527 organizations for partisan voter drives to influence federal elections which are aimed at the general public. The Center for Responsive Politics separately endorsed this argument.

Meanwhile, the Republican National Committee also filed comments on the ABC request, concurring in the reform groups' conclusion about the impermissibility of "indirect" corporate and labor expenditures for partisan voter drives aimed at the general public. The RNC also expressed concern about large contributions from individuals to 527 organizations undertaking electioneering efforts with the express purpose of electing or defeating federal candidates, as well as the "apparent funneling of foreign money" through some 527s into federal elections.

[Click here to view the ACT Advisory Opinion request.](#)

[Click here to view the ABC Advisory Opinion request.](#)

[Click here to view comments from the Campaign Legal Center and Democracy 21 on the ABC Advisory Opinion request.](#)

[Click here to view comments from the Center for Responsive Politics on the ABC Advisory Opinion request.](#)

[Click here to view comments from the RNC on the ABC Advisory Opinion request.](#)

Moreover, on January 15, 2004, the FEC endorsed a plan to commence a rulemaking on the issue of 527s, particularly to examine when such organizations would be treated as federal political committees that must raise and spend only hard money. Four FEC Commissioners – Chairman Bradley Smith and Commissioners David Mason, Michael Toner and Scott Thomas – voted in favor of the plan to undertake this rulemaking, while Vice Chair Ellen Weintraub and Commissioner Denny McDonald dissented. Hearings in conjunction with this rulemaking would be held in April; the objective is to adopt regulations in May.

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The FEC was slated to begin considering a draft response to the ABC request - prepared by its Office of General Counsel - at its public meeting on Thursday, February 5. However, it decided to defer considering that draft response until its public meeting on February 18. The Commission had received extensive comments on the draft after it was made public on January 28. According to news accounts, Democratic Commissioners asked for additional time to review these comments before the FEC considered the draft.

The General Counsel's draft response to the ABC request would require political committees to use "hard money" to finance public communications promoting or attacking clearly identified federal candidates. However, although ABC indicated that its purpose is to reelect President Bush and

defeat the Democratic presidential nominee, the draft does not treat ABC in its entirety as a federal "political committee" limited to receiving and spending hard money. Rather, it allows the group to operate a "non-federal" account which would raise and spend soft money to defray at least part of the costs of its generic partisan voter drive activity and communications mentioning particular federal and non-federal candidates.

The Campaign Legal Center, Democracy 21 and the Center for Responsive Politics filed joint comments with the FEC on the draft response to the ABC request. These comments applauded the draft's conclusion that spending by political committees for communications which promote or attack federal candidates must be financed with hard money. In response to comments filed by some section 501(c) non-profits expressing concern that this ruling would apply to their spending, the reform groups emphasized that this was not the case, stating:

The general counsel's discussion of the "promote support" test is explicitly limited to the communications by political committees . . . Nothing in the opinion purports to apply this standard to section 501(c) nonprofit corporations. The opinion makes no reference at all to such groups, and provides no basis for concluding that it would be applicable to such groups.

At the same time, the reform groups criticized the draft for failing to treat ABC in its entirety as a federal political committee limited to raising and spending hard money - noting that the organization's overriding purpose is to influence the election or defeat of particular federal candidates. They also argued that the allocation approach favored by the draft "can readily be 'gamed' in order to work absurd results that will, for instance, allow funding of generic partisan voter mobilization activity to influence federal elections with entirely soft money."

The reform groups amplified some of the themes contained in their comments on the draft response to the ABC request in their subsequent comments to the FEC on the ACT Advisory Opinion request. In particular, these comments explained why the "promote, support, attack or oppose" standard properly applied to political organizations would not, under prevailing federal campaign finance statutes and case law, extend to Section 501(c) non-profits. They also set forth evidence in support of the argument that ACT's "overriding purpose . . . is to engage in partisan voter mobilization activities aimed at the general public, and public communications, for the purpose of defeating President Bush." Thus, the organization's activities "should be funded exclusively with federal funds."

[To view the General Counsel's draft response to the ABC Advisory Opinion request, please click here.](#)

[To view other comments on the General Counsel's ABC draft, please click here.](#)

[To view the comments of the Campaign Legal Center, Democracy 21 and the Center for Responsive Politics on the ABC draft, please click here.](#)

[To view the comments of the Campaign Legal Center, Democracy 21 and the Center for Responsive Politics on the ACT Advisory Opinion request, please click here.](#)

FEC Issues Advisory Opinion 2003-38 on Fundraising for RGA

On January 12, 2004, the FEC issued an Advisory Opinion concerning

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permissible participation of federal candidates and officeholders in fundraising events, and in written fundraising solicitations, for the Republican Governors' Association (RGA). In its request, the RGA indicated that it does not anticipate engaging in "Federal election activity."

Pursuing a framework adopted in a prior Advisory Opinion addressing permissible fundraising for state and local candidates, the Commission indicated that mere attendance at RGA fundraising events (including those that raise non-federal funds) by federal officeholders and candidates would not violate the Reform Act's soft money fundraising restraints. If a federal officeholder or candidate gives a speech at that event generally soliciting funds for the RGA, it must be made clear that he or she is soliciting only federally permissible funds. This clarification can be achieved either through the clear and conspicuous display of written notices at the event, indicating that the federal candidate or officeholder is soliciting only federally permissible funds, or a statement by the federal officeholder or candidate to similar effect. The Advisory Opinion also sets forth rules for RGA written solicitations of funds featuring federal candidates and officeholders, among other things clarifying that RGA solicitation materials in which a federal officeholder or candidate has authorized his or her appearance may not ask for donations from federally impermissible sources or exceeding federal amount limitations (e.g., the solicitation cannot ask for a \$50,000 contribution from individuals but then indicate that the federal officeholder is only asking for \$5,000 donations from individuals).

The Advisory Opinion also indicated that solicitations of funds by federal officeholders and candidates for a "Conference Account" maintained by the RGA are fully subject to the Reform Act's soft money fundraising restraints. The Conference Account is used to pay for the administrative and events costs associated with the RGA's Annual Conference, as well as Governors Forums conducted throughout the country. In ruling that federal officeholder and candidate solicitations for the Conference Account are subject to the Reform Act's soft money fundraising restraints, the Commission noted the RGA's status as a 527 organization and the Supreme Court's characterization of such organizations as engaging in partisan political activity "by definition" in *McConnell v. FEC*. The Campaign Legal Center had filed comments on this particular issue, urging the Commission to conclude that federal officeholder and candidate solicitations for the RGA's "Conference Account" were in fact subject to the Reform Act's soft money fundraising restraints, in light of the RGA's status as a 527 political organization.

[Click here to view Advisory Opinion 2003-36.](#)

[Click here to view the request for Advisory Opinion 2003-36.](#)

[Click here to view the Campaign Legal Center's comments on drafts of Advisory Opinion 2003-36.](#)

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FEC Decision on Leadership Forum and Democratic State Parties Organization

On April 25, 2003, the FEC notified the Legal Center and other public interest organizations of the outcome of their November, 2002 complaint filed against the Democratic National Committee, the National Republican Congressional Committee, and two "shadow groups" associated with the respective national party committees. By a vote of four-to-two, the Commissioners accepted the FEC Office of General Counsel's recommendations that the DNC and two shadow groups had not violated the Bipartisan Campaign Reform Act's national party soft money ban, and that no enforcement action beyond an admonition was warranted with

respect to the NRCC. The General Counsel's report, however, cautioned both "shadow groups" about their future activities and potential consequences under the Reform Act.

[Click to read full text](#)

FEC Requests More Information from The Leadership Forum

On December 2, 2002, the FEC responded to the Leadership Forum's request for an advisory opinion. It asked the Leadership Forum to provide information and documents relating to potential ties to the National Republican Congressional Committee (NRCC), current and planned uses of the \$1 million soft money transfer from the NRCC, and other aspects of the organization's activities, plans, and funding. The Leadership Forum must provide such information to the Commission for its advisory opinion request to be eligible for consideration.

[Click here to view the FEC's letter in its entirety.](#)

Request for FEC Advisory Opinion from The Leadership Forum

On November 21, 2002, the Leadership Forum submitted a request to the FEC for an advisory opinion which would indicate that the organization was not directly or indirectly established, financed, maintained or controlled by the National Republican Congressional Committee (NRCC) for purposes of the Bipartisan Campaign Reform Act of 2002.

[Click here to view the Leadership Forum's letter in its entirety.](#)

Comments of Legal Center General Counsel Trevor Potter at Press Conference Announcing FEC Complaint Challenging Illegal Soft Money Schemes

Legal Center General Counsel Trevor Potter delivered remarks at a press conference on November 21st, 2002 announcing the filing of a complaint with the FEC challenging schemes by both major political parties to violate the new campaign finance law's soft money restrictions. Attached to the press release containing Mr. Potter's comments and explaining the complaint is a chart listing known 'Shadow Soft Money Committees' and their links to the national parties.

[Click here to view the comments in their entirety.](#)

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FEC Complaint Filed by The Campaign and Media Legal Center, Democracy 21, Common Cause, and the Center for Responsive Politics Challenging Illegal Soft Money Schemes

On November 21, 2002, the Legal Center joined other public interest organizations in filing a complaint with the FEC challenging schemes by both major political parties to violate the new campaign finance law's soft money restrictions.

[Click here to view the complaint in its entirety.](#)

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MORE SOFT MONEY HARD LAW

http://www.moresoftmoneyhardlaw.com/moresoftmoneyhardlaw/updates/federal_candidate...

©2005 Perkins Cole LLP The Republican Governors' Opinion: More on What Candidates Cannot, Do with "527s"

Posted: 1/13/04

In Advisory Opinion 2003-36, the Federal Election Commission allowed federal candidates, federal officeholders and their agents to raise federally eligible funds in amounts of up to \$5,000 per calendar year for "Section 527" organizations—that is, political organizations that are not registered with the FEC. The opinion, issued to the Republican Governors Association and released yesterday, offers new, important and perspectives on the applicable law.

The Basic Idea

We need to begin at the beginning. Under BCRA, federal officeholders, candidates and their agents may raise funds in connection with federal elections only within federal source restrictions, contribution limits and reporting requirements. *Similar rules apply to their fundraising for elections other than those for federal office.* They may raise only funds that fall within the amounts permitted for federal contribution limits and restrictions: i.e. they may not raise corporate or labor money, or exceed a limit of \$2,000 per election per candidate, and so forth.

Accepting RGA's representations that it participated in state and local—but NOT federal elections—and conducted no "Federal election activity," the FEC found that fundraising for the RGA was "in connection with any election other than an election for federal office." In other words, federal officeholders, candidates and their agents could raise funds for the RGA outside FEC reporting requirements, but only from individuals and other federally eligible sources, such as federal PACs, and only in increments of up to \$5,000 per calendar year. The FEC also allowed them to attend, speak and broadly participate in 527 soft money fundraising events, so long as they either did not actually ask for money, or qualified their solicitations with disclaimers making clear that they were asking only for federally permissible money.

The Specifics and the Fine Print

The FEC suggested that federal officeholders and

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candidates could engage in a wide range of conduct in connection with 527 fundraising events without triggering BCRA's fundraising restrictions at all. It emphasized that BCRA's soft money fundraising restrictions are triggered only when the candidate, officeholder or an agent actually asks that a contribution be made. A candidate or officeholder "will not be held liable for soliciting funds in violation of [BCRA] ... merely by virtue of attending or participating in any manner in connection with a fundraising event at which non-Federal funds are raised." The candidate or officeholder can participate in the event, or in any of the activities conducted at the event.

Only a Candidate Can Speak for Himself. This is the key element of the FEC's reading of this area of the law: federal officeholders and candidates would not be held liable for the conduct of others outside their control. Officeholder or candidate liability, in the FEC's words, "must be determined by his or her own speech and actions in asking for funds or those of his or her agents...." Thus, for example, a federal officeholder or candidate could give a speech at a 527 soft money fundraising event without asking for funds, and without needing to add a disclaimer, "even though speeches by others solicit such funds." Congressman Jones can be preceded and then followed on the program by speakers urging financial support for the organization; and so long as Jones does not also appeal for funds, his involvement in the program presents no illegal solicitation issue.

But What If He Wants to Ask for Money? What if Jones does wish to ask for money in his portion of the speaking program? The FEC allowed officeholders and candidates to ask for funds while speaking at soft money fundraising events, but only "if written notices are clearly and conspicuously displayed at the event indicating that the covered individual is soliciting only federally permissible funds." How many notices? The FEC does not say. Alternatively, the officeholder or candidate may make an oral disclaimer to that same effect in his or her presentation. The FEC endorsed the following disclaimer:

"I am asking for a donation of up to \$5,000 per year. I am not asking for funds from corporations, labor organizations, or other Federally prohibited sources."

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This statement would have to be included in his or her remarks, and presumably uttered audibly and not sotto voce or in a foreign language (unless there is reason to believe that the audience, say, at some National Day event, could understand the language spoken). The FEC did stress that he or she need only provide this disclaimer once, and need not make it during "one-on-one discussions" with donors or other people at the event.

The FEC reemphasized, as it has on other occasions, that officeholders and candidates cannot "inoculate a solicitation of non-Federal funds by reciting a rote limitation, but then encouraging the potential donor to disregard the limitation." The FEC does not say what it means to "encourage" a potential donor to disregard the stated limitation and contribute soft money. The FEC does not say, and the word "encourage" is not a defined term under the FEC rules. We can assume that if the candidate states that he is only asking for federally permissible funds, only to burst into derisive laughter, or to say "Sure, and I have a bridge in Brooklyn to sell you," the regulators may allege improper "encouragement."

Appearing in Event Materials. A federal officeholder or candidate may also appear on a fundraising invitation or solicitation letter for a 527, but under somewhat more restrictive circumstances.

On the one hand, the FEC said that publicity for an event standing alone would not necessarily constitute a solicitation of funds: "The mere mention of a covered individual in the text of a written solicitation does not, without more, constitute a solicitation or direction of nonfederal funds by that individual." The written materials would actually have to constitute a solicitation for funds" (i.e., by asking for them). Moreover, in keeping with the principle that candidates speak only for themselves and are not judged on the representations of others, the officeholder or candidate must also approve, authorize, agree or consent to being featured in the materials.

But If the Candidate Appears in a Written Solicitation?

The FEC made clear that a candidate or officeholder cannot agree to appear in a written solicitation for soft money. A disclaimer of the kind allowed for an event engagement cannot "cure" a soft money solicitation. For example, a fundraising invitation featuring and approved by a federal candidate could not say, "Individuals and Corporations, \$1,000," and

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then be made legal by adding a clause saying that "Senator X is asking for a donation of up to \$5,000 per year. He is not asking for funds from corporations, labor organizations, or other federally prohibited sources." The solicitations featuring the candidate must only seek hard money.

This portion of the opinion makes clear that the rules are different for personal speaking engagements on the one hand, and appearances in event solicitations on the other. In the first case, the candidate or officeholder can ask for money, but deal with the "soft money" problem with a "disclaimer," oral or written. In the second, the disclaimer does not effect a cure: a candidate or officeholder cannot consent to appear in a written event solicitation that requests soft money.

And If the Candidate Is Honorary Chair of the Event? The FEC could not agree on "whether the use of a covered person's name in a position not specifically related to fundraising, such as 'honorary chairperson,' on a solicitation not signed by the covered person, is prohibited by the Act."

What If the 527 Is Not Raising the Money for Election-Related Activity? The FEC addressed a matter peculiar to the RGA's status that may have larger import for 527 groups. The RGA told the FEC that it maintained a "conference account" from which it did not engage in any election-related activities, but rather from which it paid for meetings of Republican governors and other public policy activities. It asked whether federal officeholders and candidates could raise unlimited funds for this account regardless of source, on the theory that activities paid from these funds would not be election-related.

The FEC said: No--at least in this case involving the RGA. The FEC noted that the RGA's basic overall purpose as a 527 organization was to engage in partisan political activity, and that the RGA may have treated the conference account as exempt function income under IRS rules. Under these circumstances, BCRA's restrictions apply. However, the FEC left open the possibility that "other legal or factual considerations" might yield a different outcome in a different case, on different facts, involving a different 527.

The FEC applied the same reasoning to hold that the RGA's conference account could not accept donations from corporations chartered by Act of Congress, such

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as Fannie Mae or Freddie Mac, which are prohibited from making contributions or expenditures in connection with nonfederal elections.

Postscript: The RNC and the RGA Have Gone Their Separate Ways

The FEC assumed without deciding that the RGA had severed its ties from the Republican National Committee before BCRA took effect in November 2002, and that the RGA was not otherwise subject to BCRA's soft money restrictions. This is because the RGA so stated. Had the RGA not so stated, and its relationship to the RNC had been an issue, the analysis would be very different. In this way, BCRA operates to discourage close relationships between different operating units of a political party, such as the RNC and the RGA.

Another, Related Note: FEC Priorities for Rulemaking in 2004 May Include "527s."

The FEC will discuss at its next public meeting, on Thursday, January 15, its rulemaking priorities for the next year. The General Counsel, in consultation with the Regulations Committee, suggests that "the rules...need to be reexamined regarding the determination as to when 527 organizations and other groups become political committees."

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